

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOISE PEPION COBELL et al.)	
)	
Plaintiffs)	
)	
v.)	Civil Action No.
)	96-1285 (RCL)
GALE A. NORTON)	
SECRETARY OF THE INTERIOR, et al.))	
)	
Defendants)	
)	
_____)	

FIFTH REPORT OF THE COURT MONITOR

I. INTRODUCTION

This is the fifth report in a series of reports submitted by the Court Monitor pursuant to this Court's Order of April 16, 2001, to review and monitor all of the Interior defendants' trust reform activities and file written reports of (the Court Monitor's) findings with the Court.®

This report will address the Court Monitor's monitoring and subsequent review of the Interior defendants' (A)Defendants'® Office of Historical Accounting's (OHTA) progress in complying with this Court's December 21, 1999 order to provide the plaintiffs, IIM account holders, with an historical accounting of their Individual Indian Money (IIM) trust accounts. Specifically, this Court held:

A1. The Indian Trust Fund Management Reform Act, 28 U.S.C. Sections 162a et seq., requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited.

2.The Indian Trust Fund Management Reform Act, 25 U.S.C. Sections 162a et seq & 4011 et seq., requires defendants to retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs.® *Cobell v. Babbitt*, 91 F. Supp.2d 1 (D.D.C. 1999) at 58.
emphasis added.

II. SCOPE OF THE HISTORICAL ACCOUNTING

In its opinion, this Court addressed the scope of this historical accounting. It began that analysis by stating:

AThe balance of the court=s task today involves only plaintiffs= requests for prospective relief with regard to their rights arising from the IIM trust and related statutes. The interplay between the two components of this bifurcated case is an important issue, however, and worthy of brief discussion. Everyone understands that the second phase of this case will involve a trial regarding defendants= rendition of an accounting. In general terms, that process will involve the government bringing forward its proof on IIM trust balances and then plaintiffs making exceptions to that proof. The government mistakenly assumes, however, that because >trial two= involves the actual accounting then the scope of the required accounting B even at the most basic level B is a matter that need not be addressed today. On this point, the government is incorrect. The government alludes to the argument that the Trust Fund Management Reform Act does not require a Ahistorical accounting.@ This argument necessarily brings the issue of whether the Act requires an accounting of all IIM trust money within the scope of today=s decision. Simply put, the court cannot declare defendants= duties and assess whether defendants are in compliance with these duties without establishing the funds to which the duties apply. The disposition of this narrow (but threshold) issue leaves all other accounting issues as matters for the second component of this litigation, consistent with the government=s position. With the boundaries of the two components clarified, the court will turn its attention to plaintiffs= requests for prospective relief.@ *Id.* at 31-32, footnote and citations omitted, emphasis added.

In footnote 22, this Court listed some examples of the issues remaining for the second phase of the trial:

AFor example, significant legal issues that remain matters for the second phase of this case include: (1) whether an applicable statute of limitations, if any, precludes any of plaintiffs= claims for an accounting; (2) whether an accounting accomplished through a sampling technique will satisfy the requirements of the Trust Fund Management Reform Act; and (3) the precise scope of plaintiffs= certified class.@ *Id.* at 32.

This Court went on to address the historical accounting later in its opinion stating:

AThe threshold issue raised by Interior is whether the Trust Fund Management Reform Act imposes on the United States and, *a fortiori*, its trustee-delegates, the duty to render a >historical accounting.= In other words, the issue is whether the command that >(t)he Secretary (of the Interior) shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of Y an individual Indian,= really means >all funds.= Defendants apparently claim that the phrase >all funds= means something less than all funds. Plaintiffs claim that the Trust Fund Management Reform Act creates the duty to render an accurate accounting of all IIM trust fund money held by defendants in trust for individual Indians, without regard to the age of the funds.

The analysis of this point is necessarily brief because the first prong of the *Chevron* analysis - - whether Congress has >directly spoken to the precise question at issue= - - resolves in favor of plaintiffs. In 25 U.S.C. Section

4011, Congress specifically provided, under the caption >Responsibility of the Secretary to account for the daily and annual balances of Indian trust funds,= that the >Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian pursuant to the Act of June 24, 1938.= It is clear that >shall= places a mandatory duty on the Secretary of the Interior to take the enumerated action. Shall means shallY. The only issue is whether >all funds= meant, as defendants urge, some subset of funds held in the IIM trust. Judging from the plain language of the text, as *Chevron* and all basic principles of statutory construction demand, the court can see no basis for inferring any such limitation. To the contrary, Congress directed that the Secretary of the Interior account for all funds. The court cannot put a finer point on it than that. Defendants= position ignores the very reasons that Congress was forced to pass the Trust Fund Management Reform Act, as opposed to simply issuing more informal orders B defendants= inability to render an accounting of plaintiffs= money held in trust for the past century.@
Id. at 40-41, footnote and citations omitted, emphasis in original.

Here, also, this Court expanded upon its ruling by stating in footnote 32:

AlIt should be noted that the court is not ruling upon what specific form of accounting, if any, the Trust Fund Management Reform Act requires. For example, the court does not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants= statutory duties. Moreover, the court will not now address other arguments that the government may make in the future on the >historical= nature of the accounting (e.g., statute-of-limitations arguments).@ *Id.* at 40.

Defendants unsuccessfully appealed this ruling. Their central argument challenging this Court's historical accounting decision was addressed by the United States Court of Appeals, District of Columbia Circuit (Circuit Court):

AAppeallants= challenge focuses on the district court=s conclusion that the IIM trust beneficiaries are entitled to a complete historical accounting of their trust accounts. The government maintains that no such right is conferred by the 1994 Act. Rather, the Act delegates responsibility for determining the nature and scope of an accounting to the Interior Department. The accounting required by Section 102 of the Act is merely a prospective right and, according to appellants, >does not speak to the extent to which the Secretary must inquire into the correctness of past transactions.= While appellants concede that >some type of review of past transactions may indeed be necessary to accurately state opening balances,= this does not mean that the plaintiffs have a judicially enforceable right to a complete historical accounting. Even were the plaintiffs entitled to such an accounting, appellants contend that the Interior Department, and not the court, would have the authority to determine the nature and scope of the accounting.

Contrary to appellants= claims, Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for >all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.= >All funds= means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938). Therefore, the 1994 Act reaffirms the government=s preexisting

fiduciary duty to perform a complete historical accounting of trust fund assets.

Y.

Appellants maintain that even if an accounting is required, the district court overstepped its bounds by defining the nature of the accounting required.

This argument both misrepresents the district court's opinion and misconstrues the relevant trust law principles. The district court made clear that it was not ruling upon what specific form of accounting, if any, is required by the 1994 Act or the government's preexisting fiduciary obligations. Rather, it noted that an accounting is, in fact, required, and that such an accounting must be of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited. The district court explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate. Such decisions are properly left in the hands of administrative agencies. *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) at 1102-1104, citations omitted, emphasis in original.

In concluding its review of the Interior defendants' breach of their fiduciary duties, the Circuit Court held:

The actual legal breach is the failure to provide an accounting, not its failure to take the discrete individual steps that would facilitate an accounting. Thus, while the district court must amend its opinion on remand to account for this distinction, there is no need to alter the district court's order, as the bottom line is the same: By failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, appellants breached their duties. *Id.* at 1106.

III. PARTIAL SUMMARY JUDGMENT MOTIONS

The Defendants did not seek review by the Supreme Court of the United States. However, they did seek further relief from this Court following its December 21, 1999 decision but before the Circuit Court's affirmation of that decision. Between March 2000 and September 2000, they filed three motions for partial summary judgment with this Court regarding the historical accounting during the course of their appeal.

The first, Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims For An Historical Accounting of IIM Accounts, filed March 27, 2000, sought to have this Court decide whether the law requires a particular method and scope of historical accounting or reconciliation. See Memorandum In Support Of Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims For An Historical Accounting Of IIM Accounts at 4. Further Expanding on their request, they told this Court:

Defendants are entitled to summary judgment on Plaintiffs' claim for an historical accounting of the individual Indian money (>IIM=) accounts because the American Indian Trust Management Reform Act of 1994 (>1994 Reform Act) does not provide for the accounting they seek. To the extent the 1994 Reform Act imposes an obligation upon Defendants to address

account activity that occurred before the passage of the Act, it does so only within the context of its requirement that Interior prospectively report accurate account information to beneficiaries. Defendants are also entitled to summary judgment that this Court's jurisdiction limits the extent to which any IIM account balance can be >corrected= or >restated= in this action. Specifically, Plaintiffs' claim to have balances >restated= or >corrected= to reflect amounts that should have been credited or earned is beyond this Court's jurisdiction.® *Id.* at 1.

Addressing the obvious question of why this motion was not premature in light of their appeal of this Court's December 21, 1999 decision on the scope of the historical accounting, the Defendants went on to state:

Before addressing the substance of the Motion, we briefly describe how this Motion fits into the evolution of this case. In its Memorandum Opinion and Order of December 21, 1999, this Court decided the Phase I prospective issues, and also decided one Phase II issue by holding that >the funds to which the Defendants' accounting duties apply,= encompass >all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited.= The Court reiterated its intent to hold a >trial regarding defendants' rendition of an accounting.= The Court certified its order for interlocutory appeal, and directed that >(o)ther proceedings in this matter shall not be stayed during the pendency of any interlocutory appeal that is taken.= *Id.* at 1, citations omitted.

Addressing their appeal of this Court's ruling on the scope of the historical accounting and their decision to conduct a Federal Register notice process to obtain public comment on the reasonable approaches to addressing the issue of accuracy of current balances,® the Defendants stated:

These two developments put a sharp focus on one of the central issues of Phase II B the extent to which this Court can define the scope of Interior's obligation to analyze historical transactions before the agency has done so. Defendants maintain, as set out in the Petition for Permission to Appeal, that the agency must be allowed, in the first instance, to determine matters regarding the scope of the 1994 Reform Act, including the role an historical analysis should play in its full implementation. However, since that issue is now on appeal, it would appear to be inappropriate to present arguments, which directly relate to that issue here, since jurisdiction over that aspect of the case has shifted to the Court of Appeals.

Y.

Nevertheless, in light of this Court's directive to proceed with Phase II notwithstanding any appeal, and in the interest of avoiding any unnecessary delay, we present here an issue that could be decided now.

¹ However, the Defendants did address the fact that the future course of Phase II was controlled by the issue before the Court of Appeals in suggesting® but not requesting® that the Court stay further proceedings regarding the Plaintiffs' contentions as to an historical reconciliation of the IIM trust pending the outcome of the appeal. Apparently, this stay would have included delaying their obligation to begin the historical accounting

In doing so, Defendants do not intend to ask this Court to answer the same questions now on appeal to the D.C. Circuit. The appeal addresses the question of whether the way in which Interior will address issues concerning historical transactions is for Interior, not this Court to determine in the first instance. That question is different from, and antecedent to, the questions this Motion raises. To decide whether a trial on Plaintiffs' accounting claim is permissible, the D.C. Circuit does not need to decide whether the 1994 Reform Act requires any particular type of accounting or reconciliation. In contrast, this Court is being asked to decide, on the assumption that there will be a trial on the merits of an accounting claim, whether for that trial the law requires a particular method and scope of historical accounting or reconciliation.® *Id.* at 2-4, citations omitted, emphasis added.

Having stated what they sought to have this Court determine, they proceeded to quote what the Plaintiffs had stated they wanted for that A particular method and scope® of the historical accounting:

A Plaintiffs contend that they are entitled to an accounting that provides a >statement of balances, including without limitation any funds, wherever and whenever held, that should stand to the credit of the IIM Trust and each individual Indian trust beneficiary from that point in time the United States first assumed trust responsibility for management of individual Indian lands and first owed a specific trust responsibility to each such person entitled to receive revenues generated from such trust landsY.= Thus, Plaintiffs seek to establish what balances >should= have been at all points since the IIM trust system began, and what balances should be now, for both the IIM trust as a whole and for each individual Indian trust beneficiary.

Y.

Plaintiffs stress that their requested accounting >encompasses every past and present individual Indian (or his heirs, estate, or personal representative) on whose behalf as trust beneficiary, a specific trust account is now, has been should be, or should have been established and maintained with the United States or its agents.= In Plaintiffs' view, >(t)he purpose of an accounting is to verify and establish, where appropriate, the correct balances of the trust and correct balances for the individual trust beneficiaries from the date the United States voluntarily assumed its trust responsibility to manage and administer the property of individual Indian trust beneficiariesY.= Plaintiffs essentially demand a reconciliation of all account transactions that have occurred since the inception of the IIM trust to arrive at a >restatement= or >correction= of current account balances. As Plaintiffs' counsel recently stated their position:

The source documents with regard to the trust assets are critical to arrive at a reasonably precise estimate from Plaintiffs' perspective because we believe that every document and every dollar must be accounted for by the Defendants going back to 1887.® *Id.* at 4-5, emphasis in original.

The Defendants summarized their position of what should be included in the historical accounting in the following series of statements:

process; a suggestion this Court did not follow.

The 1994 Reform Act, therefore, is prospective and does not contain the clear expression of congressional intent that is necessary for the statute to have retroactive effect. There is no explicit requirement to perform an historical accounting and no language giving retroactive effect to the requirements to perform periodic accounting and auditing of the IIM accounts.

Implicit within the on-going obligations to provide accurate information is the necessity to address, in some manner, the so-called >beginning balance= question. That is, even assuming current account information is accurately reported, a statement about the accuracy of a balance requires consideration of the opening balance for any particular period. Because all IIM trust balances had not been routinely reviewed and reconciled for some time prior to the 1994 Reform Act, the Act's obligation to ensure accuracy in reporting to beneficiaries necessarily requires that the pre-enactment activity be addressed. *This implication, however, does not impose an obligation to reconstruct and report all IIM account transactions that occurred prior to the October 25, 1994 enactment of the 1994 Reform Act. Rather, as demonstrated below, precisely because of the complexity of reviewing or reconciling account histories, Congress purposefully chose not to legislate the parameters of any historical review, leaving that to the discretion of Interior.*

We will demonstrate that it is incorrect to conclude, as Plaintiffs apparently do, that the fact that Congress left the matter open means that a court may impose all common-law accounting requirements, as if this were a case involving a private trust.² *Id.* at 7-8, citations omitted, emphasis added.

The Defendants, notwithstanding the fact the Court did not render an opinion on this motion, took it upon themselves to limit the scope of the accounting as described in the First Report of the Court Monitor submitted July 11, 2001, by 1) limiting the putative accounting decision to a statistical sampling of 350 IIM accounts, and; 2) limiting the ACollection of Missing Information from Outside Sources Breach Project to post 1994 hardcopy and electronic records.

² **With regard to the first limitation, see, generally, First Report at 1-29. With regard to the second limitation, the Defendants defined the scope and reasoning of the limitation on the missing document project in their AReport on Collecting Information From Outside Sources² by stating at page 2:**

Although the Order did not define the period to be covered by the directed accounting, the question of the scope and nature of Department's responsibility to render an accounting prior to October 25, 1994, the effective date of the Indian Trust Fund Management Reform Act, is under appeal. Therefore, this document details the proposed strategies for collecting missing information to meet Interior's statutory obligation. The approach for providing information to account holders for the prior period will be determined after the proposed information gathering with account holders, their representatives, and other interested parties.² As the First Report described, this Federal Register information-gathering process was not used to decide to begin the limited statistical sampling/historical accounting later announced by the Defendants. Nor

The succeeding partial summary judgment motions sought to limit the historical accounting by, first, ADefendants= Second Phase II Motion For Partial Summary Judgment (Re: Funds Not Deposited Or Invested Pursuant To The Act Of June 24, 1938),@filed May 12, 2000, and, second, by ADefendants= Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO),@filed September 19, 2000. Plaintiffs opposed all three motions.

This Court has not as of yet addressed these two motions. One involved funds that were paid directly by lessees of a land allotment to the allotment owners. The other sought a finding that those accounts Asettled@by other United States government agencies prior to 1951 did not fall under the Courts declaratory judgment regarding the scope of the historical accounting. Specifically, in this motion for partial summary judgment, the Interior defendants argued:

AI n this Motion, Defendants demonstrate that even assuming the existence of a cause of action for an accounting, Plaintiffs would not be entitled to an accounting or reconciliation of transactions that have already been reconciled and settled in accordance with existing law. Specifically, between 1817 and 1951, governing law required each disbursing agent to submit his accounts, including those relating to IIM accounts, for settlement. Settlement consisted of a double audit B one by the Indian Office in Washington, D.C. and then by a second agency (the Department of the Treasury (>Treasury=) until 1921 and the General Accounting Office (>GAO=) between 1921 and 1951). This settlement process provided a regular and specific procedure for checking the accuracy of accounts maintained on behalf of individual Indians and was the only accounting or reconciliation required by law at the time. Thus, under any circumstances, Plaintiffs are not entitled to an accounting or reconciliation that revisits transactions subject to this settlement process.@

Recently, a document has come to light that casts doubt on the viability of this argument and the survival of this particular partial summary judgment motion. Plaintiffs have come into possession of an August 27, 1999 memorandum (**Tab 1**) entitled, ACobell et al. v. Babbit et al. Civil Action No. 96CV 01285,@sent by the Principal Assistant Comptroller General of the United States, Gene L. Dodaro to John Berry, Assistant Secretary, Policy, Management & Budget, Department of the Interior (DOI).

In response to discussions between GAO staff and DOI officials regarding the evidence held by GAO that might support the argument regarding the Department of Treasury=s and

did they choose to conduct any missing records gathering prior to the effective date of the 1994 Reform Act. In actuality, they did not conduct any records collection from outside sources. The OHTA has taken over this project and is reviewing what to do with it but has apparently abandoned the 1994 date limitation.

³ It is questionable whether the first partial summary judgment motion regarding the overall scope of the accounting survived the Court of Appeals= February 23, 1001 decision affirming this Court=s ruling on the scope of the historical accounting even though defendants sought to distinguish the relief they sought in this motion from that requested on appeal.

GAO's settlement of IIM trust accounts before 1951, Mr. Dodaro stated:

“In response to questions, we have explained that our records do not establish that GAO conducted a >final= GAO comprehensive audit of IIM accounts, nor do they establish any regular practice of auditing IIM accounts.” *Id.* at 2.

It is not the objective of the Court Monitor to address the merits of these motions in this Fifth Report. However, their existence must be considered in the following discussion of the actions taken by the present Secretary of the Interior and her Executive Director in response to this Court's December 21, 1999 direction and the subsequent public pronouncements made by OHTA.

IV. THE HISTORICAL ACCOUNTING PROJECT

On July 10, 2001, Secretary of the Interior Gale Norton issued ORDER NO. 3231, entitled, “Establishment of the Office of Historical Trust Accounting” (Tab 2). It stated in part:

“Sec. 3 Establishment. The office of Historical Trust Accounting is hereby established within the Office of the Secretary. The Office of Historical Trust Accounting shall be headed by an Executive Director and may include staff representation of the bureaus and offices of the Department that have responsibility for maintaining records that evidence the historical administrative management of Indian trust assets. The Executive Director is authorized to plan, conduct, direct, and execute the historical accounting of IIM accounts.”

Sec. 5 Implementation

a. Y..

b. Within 60 days, the Executive Director will prepare a comprehensive description and timetable for completion of all steps that are needed to staff and develop a comprehensive plan for a historical accounting that meets the Department's fiduciary obligations to IIM beneficiaries.

c. Within 120 days, the Executive Director will identify the preliminary work that can be done immediately. Once that work is identified, detailed plans should be developed so that the affected bureaus and offices can begin the work.” *Id.* at 1.

The Secretary also published a memorandum on the same day entitled, “Action regarding

‘ In the interview with the OHTA staff, the Court Monitor gained the impression that Defendants will likely dispute drawing any conclusions from this 1999 document based on their most recent discussions with the GAO and location of an additional 600 boxes of potentially trust-related documents within GAO's custody that may require a new review of the question of what GAO and Treasury did in the past, if anything, regarding IIM account settlements.

Trust reform and Historical Accounting@ (Tab 3). She stated in this memorandum:

Alt is clear while the D.C. Circuit Court reiterated our duty to complete a historical accounting, it nevertheless left it in my discretion to design a method for the historical accounting that meets our fiduciary duties. The Court and Congress are looking to the Department to define the precise method by which we conduct a historical accounting.

I agree with the Court that an accounting to the IIM beneficiaries is long overdue. I understand, however, that the development and implementation of a satisfactory accounting is an enormous project that will take considerable time at substantial expense. *I also understand that the time and money necessary to complete the project itself may be important factors in the decisions about how to proceed.* However, I want to be clear that the Department is charged with a historic mission in which success is the only option. I will not accept that this is a job too big for us to accomplish. It may take time, but the historical accounting must be completed.@ *Id.* at 2, emphasis added.

The Secretary expanded upon the Order's objective of the historical accounting plan by stating:

AWithin the next 60 days, prepare a description and timetable for completion of all steps that are needed to staff and develop a comprehensive plan for the historical accounting that meets our fiduciary obligations to IIM beneficiariesY. Through this comprehensive plan, the Department will analyze all options, not just statistical sampling, so that we can demonstrate to Congress, the Court, IIM beneficiaries and the public that we have identified the most cost-effective plan to complete the historical accounting and thereby satisfy the Department's fiduciary duty. *Id.*

On September 10, 2001, the newly appointed Executive Director, Bert Edwards, issued OHTA's **ABlueprint For Developing The Comprehensive Historical Accounting Plan for Individual Indian Money Accounts@ (Tab 4)**. In describing this Court's and the Circuit Court's rulings, he stated in part:

AIn his ruling in Phase 1, Judge Lamberth of the U.S. District Court for the District of Columbia declared that the defendants owed a duty to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited.= In February 2001, the United States Circuit Court of Appeals affirmed the District Court, stating that >the Interior Secretary owes IIM beneficiaries a (historical) accounting(.)= *These opinions will necessarily serve as guidance in preparing a historical accounting of IIM funds.*@

The Court of Appeals acknowledged that there are substantial questions yet to be determined about the *scope of the accounting*. For instance, the Court noted with approval that the District Court >explicitly left open the choice of how the accounting would be conducted, whether certain appropriate methods, such as statistical sampling or something else, would be appropriate. Such decisions are properly left in the hands of administrative agencies.= The Court of Appeals also noted that other issues remained open, such as the potential applicability of statutes of limitation and the precise scope of the class to whom an accounting is owed. The Department's

actions will ultimately be scrutinized under its legal duty to deal fairly with IIM beneficiaries.⁵ *Id.* at 6, citations omitted, emphasis added.

Later, under a section entitled, AF. Establishing the Scope of the Accounting,@the Executive Director stated:

AA final determination and delineation of the Government=s fiduciary responsibilities and the obligations these responsibilities impose on the mandate to conduct the historical accounting will help define the scope of the project, establish the starting time frames, and set boundaries for what the Comprehensive Plan must addressY. There are numerous aspects of the IIM trust accounts and requirements for the historical accounting that must be considered in determining the scope of the historical accounting.⁶ *Id.* at 14-15, emphasis added.

Later, in the same section, the purported issues that had to be addressed as matters of policy in the Comprehensive Plan included the following:

- **ATemporal Scope of the Historical Accounting B The Comprehensive Plan will define how far back in time the historical accounting must go to satisfy the requirement to provide IIM beneficiaries with the information to determine if the Government has fulfilled its trust obligation. It is conceivable that the answer will differ for different groups of IIM beneficiaries.**⁷ *Id.* at 15-16, emphasis added.

And still later in the section:

AInterpretation of Results of Prior Audits and Settlements by Treasury and General Accounting OfficeY The Comprehensive Plan will determine to what extent, if any, the Department will rely on the results of these already settled accounts in the rendition of the historical accounting. *Id.* at 16, emphasis added.

And finally:

AThe Comprehensive Plan must also address cost and funding considerations, and how alternative approaches would affect the historical accounting. *Id.* at 17.

The Executive Director issued his A120-day Report Identifying Preliminary Work@on

⁵ This Court has previously stated, AYlack of funding cannot be allowed to legally impair the United States= trustee-delegates= exacting fiduciary duties toward management of this trust.⁸ *Cobell* at 48. The best and most complete, not the cheapest, method to perform the accounting should be the goal of the Secretary of the Interior and her Executive Director. Congress, as the ultimate Trustee for the IIM accounts, may not appropriate funds for that accounting and find a legislative solution, but the determination of how to do that accounting under the Court=s ruling should not be limited by the prospective concern that Congress will not fund anything but the cheapest pecuniary alternative.

November 7, 2001 (**Tab 5**). In it he listed under a section entitled, *APreliminary Work@* putative projects defined as *APrototype Historical Accounting Projects,* stating:

AThe prototypes are accounting projects that will contribute to the overall historical accounting and help refine accounting methods. These prototype accounting projects start with a manageable portion of the IIM accounts and will provide the first accounting results reported to IIM account holders. As the prototype accounting projects are planned, the following questions will need to be addressed. The answers to these questions also will be incorporated into the Comprehensive Plan for the historical accounting.⁶ *Id.*

at 10.

One of those questions was the following:

– ***What is the proper temporal scope of the accounting?*** *Id.*, emphasis added.

Having a number of questions about what was meant by the Executive Director in both his Blueprint and the 120-day Report by the term *Ascope of the accounting,* the Court Monitor interviewed him and his Deputy Director, Jeff Zippin, on two occasions during the monitoring of the historical accounting project in 2001. Zippin, when first asked by the Court Monitor to define his understanding of the *Ascope@* of the historical accounting as addressed by the Executive Director in his reports could not explain what the terminology meant in either document.

Zippin had not been advised by anyone of the interpretation of what the Court's ruling on the historical accounting meant with regard to the determination of how far back to reconcile the IIM account holders records to arrive at an accurate accounting. It was his understanding that, using various techniques, it might be possible to compile an accurate accounting of those records without the need to examine all records going back to the award of the first Indian Trust allotments. That would be the practical method for determining the scope of the accounting in his view. However, he was not aware of whether that would satisfy this Court's and the Circuit Court's decisions addressing the scope of the historical accounting.

He also had no clear idea of whether it would be necessary to account for direct pay monies or those accounts settled prior to 1951 by the Treasury or GAO. He understood that these questions had been put to this Court for resolution. He believed answers to them one way or the other would assist his office in developing a complete Comprehensive Plan and addressing the actual prototype accountings that they planned to begin in the near future. He was not certain what he would do or the OHTA would do if those answers were not forthcoming.

The Executive Director confirmed Zippin's account of the need for legal direction regarding the scope of the accounting and expanded upon it. The OHTA has been tasked to perform an accounting for IIM account holders. The questions as to whether the scope

⁶ **November 8, 2001 and November 20, 2001. As will be discussed later, a follow-up review interview was held with Mr. Edwards and his staff on January 22, 2002 following the submission of the 8th Quarterly Report including a further report by OHTA. See pages 13-15.**

of the accounting as described by this Court and affirmed by the Circuit Court could be limited in any manner based on legal or other administrative or judicial actions over the years have not been addressed by OHTA. Until those questions previously posed by the past administration to the Court and other potential questions raised by his staff's efforts to this point are answered, he could not determine the actual scope of the accounting work to be done.

For instance, it was Edwards's understanding that the question of whether this Court's decision regarding All funds included a requirement to reconcile funds deposited in deceased account holders' accounts as opposed to living account holders was still unanswered. Thus, in Edwards's opinion, the scope of the accounting might properly be limited to the accounts of living account holders. Edwards did not specifically answer the question posed by the Court Monitor regarding how an accounting of living account holders' IIM accounts could be certified as accurate without considering whether their ancestors' accounts, from which they received their holdings and monies, were accurately maintained and accounted for going back as far as the establishment of the original land allotments.

In light of these and other questions he and his staff had, Edwards planned to seek the advice of the DOI and DOJ attorneys and outside firm legal counsel to address these and other legal issues as they were uncovered by OHTA. That legal consultation was ongoing and he planned to structure OHTA's work on the historical accounting based on the legal advice he received. It was his understanding that if the attorneys believed that a legal issue regarding the accounting required Court resolution, additional legal motions would be filed. No such motions had been filed during his tenure.

V. CONGRESS' DIRECTION ON THE HISTORICAL ACCOUNTING PROJECT

On October 11, 2001 Congress published a Conference Committee Report regarding the appropriations for the Office Of Special Trustee For American Indians' Federal Trust Programs (**Tab 6**). In it, the Committee addressed the historical accounting project by stating:

The managers wish to clarify the language included in the House report with respect to funding for an historical accounting. The managers note that both the House and Senate have provided the funds requested by the Administration for an historical accounting. However, the managers remain very concerned about the costs associated with such an accounting. Therefore, these funds may not be allocated prior to the report requested by the Committees detailing the methods and costs associated with an historical accounting.

The managers reiterate the position that they will not appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful.

If the Department working with the plaintiffs and the Court, cannot find a cost effective method for an historical accounting, the Congress may have to consider a legislative remedy to resolve this and other litigation issues.® *Id.*, emphasis added.

VI. THE EIGHTH QUARTERLY REPORT

On January 17, 2002, the Secretary of the Interior submitted under her signature AStatus Report to the Court Number Eight@ (AEighth Quarterly Report). The OHTA section is at pages 21 to 38 of the Eighth Quarterly Report (extract at **Tab 7**). The Special Trustee Observations concerning the historical accounting are at page 31.

The Special Trustee's comments stated:

As part of the accounting, the effort to provide an *historical accounting* is enormous and interconnects with other efforts directed at data cleanup. Project management issues for historical accounting will require careful coordination and demand considerable executive skill. In addition, it is unclear to the Special Trustee whether or not the specific requirements of a full accounting to each beneficiary have been identified.⁶ *Id.* at 31, emphasis in original.

In the OHTA report at pages 31 and 32 the ACollection of information from outside sources@ABreach@project was discussed and the following statement made:

AThe previous plan, implemented by the Office of Special Trustee (OST), was initially limited to the period after October 25, 1994, and stated that the approach for the period prior to October 25, 1994, would be determined at a later date (in conjunction with the development of the historical accounting project). Accordingly, the steps planned by OHTA address records which may have been generated as far back as 1887, the year the General Allotment Act was enacted. In part, this plan is intended to assist the Congress and the Court in determining what is a reasonable time period for an historical accounting. The Department's analysis will be detailed in the Comprehensive Plan for the historical accounting.⁷ *Id.* at 32.

This statement by OHTA, coupled with the previously quoted OHTA written statements regarding the Defendants' planned attempt to determine the Ascope@ of the time period for the historical accounting directed by this Court, indicated that the Executive Director had come to a decision on the legal scope of the accounting he would follow. Therefore, it was of interest to the Court Monitor to determine just what analysis had been made by the Defendants that they believed would Aassist@ this Court and Congress in determining a reasonable time period for an historical accounting in light of the fact that Ascope@ had already been clearly defined by Congress, this Court, and the Circuit Court.

On January 22, 2002, the Court Monitor met with Executive Director and members of his staff including Mr. Zippin. The substance of the interview was as follows:

The Court Monitor again asked what had been meant by the two previous OHTA reports reference to OHTA's determining the Atemporal scope of the accounting@ when this Court had already addressed the scope and the Circuit Court had later affirmed that scope? Also,

⁷ **The Court Monitor has addressed the balance of the Eighth Quarterly Report in the Sixth Report of the Court Monitor.**

what was meant in the Eighth Quarterly Reports OHTA section by the statement that the Aplan is intended to assist the Congress and the Court in determining what is a reasonable time period for an historical accounting when the Court has already ruled on the proper scope based on the language in Congress= 1994 Reform Act?

Mr. Edwards, assisted by his staff, explained that OHTA had been in discussions with Solicitor= Office (SOL) and Department of Justice (DOJ) attorneys addressing the issue. What OHTA has meant by determining the scope of the accounting and presenting their position to the Court and Congress was that, while it is recognized that this Court has determined the historical scope of the accounting, the method to accomplish that accounting may possibly be limited by legal and accounting considerations. For example, if the Court agrees with the Defendants that the GAO and Treasury settlements of IIM accounts supercede the Defendants= need to examine accounts reviewed by these organizations, the historical accounting may properly be limited to reviewing accounts after 1951. Also, if the Court decides that monies paid directly to IIM account holders by leaseholders do not qualify as trust assets, the number of transactions that will have to be reviewed can be limited significantly.

With respect to the issue of limiting the historical accounting to living IIM account holders= accounts, Mr. Edwards stated that a valid probate of an account holder= estate may allow the OHTA to limit the historical accounting to transactions following that probate. Any discrepancies in deceased accountholders= accounts prior to the probate might possibly be considered resolved by the Administrative Law Judge who adjudicated the estate. Thus, as long as the probates were valid, the preceding transactions in the deceased= could be considered accurate.

Mr. Edwards answered the question as to what process would be used to determine the scope of the accounting by stating that these legal issues and potentially others would be placed before the Secretary of the Interior for decision. This would be done on a continuing basis as the OHTA decided on the legal and practical limitations to be placed on the historical accounting with the advice and counsel of the DOJ and SOL. The recommendations of the OHTA and the Secretary= decision would become part of the administrative record on which she would base her final decision on the recommended method for the historical accounting. This decision would form the basis for the Comprehensive Plan that would be provided to Congress and this Court. The Comprehensive Plan would not only discuss the method for the accounting but also its estimated cost so that the Congress could decide whether to fund the historical accounting as the most cost effective means to meet Congress= direction regarding the accounting due the IIM Account Holders.

The Executive Director stated that it was the intent of Defendants to put some or all of these legal issues before the Court once the Secretary had decided on the OHTA recommendations and before they prepared or submitted the Comprehensive Plan to Congress. The process to address these issues with the DOJ and SOL had only recently begun. There had been no decisions by OHTA on what issues to put before the Court or how to handle the three partial summary judgment motions presently before the Court; whether to withdraw them and file one or more of them with other motions, or to file additional motions and seek the Court= ruling on all extant motions.

The OHTA staff provided the Court Monitor an update on the prototype projects and the status of consultant retention. They believed that they would be able to meet their self-imposed midyear suspense date for preparation and filing of the Comprehensive Plan.

VII ANALYSIS

The OHTA section of the Eighth Quarterly Report speaks for itself. The preparation of the Comprehensive Plan is a work in progress. There was no Comprehensive Plan for the Court Monitor to review. The prototype projects that are being touted as the start of the accounting, and will allegedly address much of the monies in the IIM Trust, are in their infancy. The legal issues that will form the basis for the Executive Director's determination of the Atemporal scope of the accounting@are yet to be determined including whether the present motions for summary judgment will be withdrawn or argument sought on them.

This Court and the Circuit Court have held that the accounting that must be performed by the Defendants is an all funds, whenever deposited, historical accounting. Both Courts have seen fit, however, to leave it to the discretion of the DOI to find the most accurate method for accomplishing that historical accounting within the existing legal and statutory parameters defined by the Courts.

From the documents prepared by and interviews conducted with the Executive Director, OHTA, and his staff, it is not clear that the Comprehensive Plan scheduled for submission to Congress in June 2002 will properly address the scope of the accounting as defined by this Court and the Circuit Court. The accounting method that was and still is to be determined by the Defendants has apparently become not only a *method* for accomplishing the accounting but also, in the mind of the Executive Director, a vehicle for determining the *scope* of that accounting due to outstanding and yet-to-be-discovered legal issues.

OHTA is presently planning to create a Comprehensive Plan for the historical accounting based on their counsel's interpretation of legal issues such as whether to take into consideration or ignore the trust monies involved in the alleged GAO and Treasury pre-1951 settlements, the direct pay deposits, and the accounts of deceased account holders. Their recommendations on whether to limit the accounting based on these interpretations will be provided to the Secretary by OHTA for her to decide on the method(s) to be used for the accounting. According to Mr. Edwards, those Secretarial decisions will become the basis for the historical accounting's A temporal scope@to be included in the Comprehensive Plan to be presented to Congress.

VI. CONCLUSIONS AND DISCUSSION

- A. The Interior Defendants Are Still Not In Compliance With This Court's December 21, 1999 Ruling Regarding The Historical Accounting. Nor Can They Achieve Compliance Without The Further Involvement Of This Court Due To The Manner In Which They Are Approaching Determination Of The Method To Do That Historical Accounting**

All funds meant all funds B whenever deposited. This Court could place no finer point on that decision. Shall account meant shall account for those funds B all of them. There is nothing left for the Interior defendants to do but devise a method or methods to do that full accounting. The Courts rulings are not Aguidance but a mandate.

If the Executive Director is considering limiting that Court-ordered historical accounting by an internal DOI review of Atemporal scope of that historical accounting, defined by him and his staff as the scope of the accounting limited by other legal issues of concern to Defendants, any limitations decided to be placed on that accounting should be placed before this Court for its review. If the Interior defendants were to base their Comprehensive Plan to be submitted to Congress on their own understanding of the law regarding that accounting as expressed in their partial summary judgment motions or on other internal legal determinations, they would be premature. This Court has been asked by Defendants in three partial summary judgment motions to address issues surrounding its historical accounting declaratory judgment prior to the Circuit Courts decision on that issue. It should properly address all such issues now following the Circuit Courts decision prior to any decision of the Congress about the sufficiency and potential success of the Defendants Comprehensive Plan.

As stated previously, there is also a practical reason for judicial review prior to the Comprehensive Plans submission to Congress. How could Congress be certain in June 2001 that the Comprehensive Plan will be successfully conducted if this Court may someday, after the historical accounting is completed by Defendants, find their legal decisions on the Atemporal scope of that accounting were not in compliance with this Courts December 21, 1999 ruling? Better to address the issues now before Congress reviews the Comprehensive Plan and denies funding for it because of concerns for the legal sufficiency of the effort or allows it to go forward only to have this Court reject it in the Phase II trial.

B. Due To The Defendant=s Intent To Create An Administrative Record On Which To Base A Final Decision Of The Secretary Of The Interior On The Atemporal Scope Of The Historical Accounting, This Court Should Rule On The Outstanding Partial Summary Judgment Motions Now To Further Clarify Its December 21, 1999 Declaratory Judgment Regarding The Scope Of That Historical Accounting And Set An Expedited Schedule For Oral Argument On These Motions Including Any Further Time Limitations Defendants May Want To Argue Are Legally Appropriate

Time is of the essence to bring about trust reform. The Defendants have had two years since this Courts decision to address how they propose to do the historical accounting. The OHTA staff is just now meeting with their attorneys to discuss the Atemporal scope of that accounting, seven months after their formation. While the Court Monitor is confident that they intend to create an administrative record to come to a final decision on their definition of the Atemporal scope of the historical accounting, there is no certainty that without Court involvement that decision will be placed before this Court for review prior to its being also

given to Congress for its appropriation decision.

In light of this uncertainty, it is respectfully submitted that this Court should consider the Defendants' partial summary judgment motions at this time. Also, it should set a briefing schedule in which the parties can further address any other issues that they may wish to place before this Court on their interpretations of its December 21, 1999 historical accounting declaratory judgment.

VII. REMARKS

This Report has reviewed the development and status of the Historical Accounting project since submission of the First Report on July 11, 2001. Its review of OHTA's planning for preparing a Comprehensive Plan is in tone different from that First Report. The First Report addressed the Court Monitor's conclusions concerning the past administration's intentional deception of this Court and the Circuit Court by alleging they were conducting a fact-gathering process on which to base a decision on the method for an historical accounting when they had, in the Court Monitor's opinion, no intention of attempting more than a statistical sampling historical accounting.

The present administration, although implicated in the past administration's decision to do

*** Since the Defendants have stated they intend to place the legal parameters of their determination of the Atemporal scope⁶ of the historical accounting before this Court, this Court may also want to consider at the same time the Plaintiffs' outstanding motion to set a trial date for the Phase II trial. A decision on that trial date and what will be expected as proof of the historical accounting could well give the Defendants and Congress a better idea of the necessary resources and funds to complete the historical accounting in the time allotted by this Court. While this is a recommendation and not a conclusion of the Court Monitor, this Court's historical accounting decision is now over two years old. No historical accounting has been begun except for some prototype projects. No plan has been created or approved for that historical accounting. It is seven years since Congress addressed that accounting in the 1994 Trust Reform Act and mandated that it be done. Plaintiffs' counsel pointed out this time delay and also surmised in APlaintiffs' Motion To Set A Trial Date For Phase II Of This Action, The Correction Of Accounts and Restatement Of The Individual Indian Trust, and Memorandums In Support Thereof,⁶ that A(a)t the end of such time (completion of the Comprehensive Plan), there is no doubt that Secretary Norton will commence another new >administrative process= ostensibly to provide an Aaccounting⁶ of the Individual Indian Trust. Perhaps the Secretary will propose another limited statistical sampling to account for >all funds= or some other artifice masquerading as an accounting. No doubt, the Secretary will appeal to the reasonableness of the Court, given the complexity of the issuesY.⁶ *Id.* at 5, fn. 4.**

a statistical sampling historical accounting by the present Secretary's initial concurrence with that decision, has lately, at her direction, begun a process to establish a means for researching and deciding on the proper method to carry out the historical accounting pursuant to this Court's December 21, 1999 ruling. There is no doubt the OHTA has made more progress in that effort in six months than the past administration did in six years. However, that process is not much further along than the plaintiffs' description of it as a Aplan for a plan.[@] The Court Monitor cannot evaluate the Comprehensive Plan because, four months before its planned submission to Congress, there still is no Plan.

The Executive Director's statements to the Court Monitor about the Atemporal scope of the accounting[@] and the Aadministrative process[@] that will be engaged to have the Secretary make a Afinal decision[@] on the scope of the accounting would seem to indicate that someone B perhaps Defendants' attorneys B believe that the Court-defined scope of the historical accounting can be properly limited by an administrative decision by the Secretary. They may be wrong. If Defendants have a serious question about the possible legal limitations on the scope of the historical accounting, it should be quickly brought before this Court for resolution. Pending that decision, there is no historical accounting process that can be properly begun by the Defendants unless it takes into account Aall funds, whenever deposited.[@]

Copies of the Fifth Report of the Court Monitor have been provided to:

Mark E. Nagle, R. Craig Lawrence, and Scott S. Harris
Judiciary Center Building
555 Fourth Street, N.W, Room 10-403
Washington, D.C. 20001

J. Christopher Kohn, Sandra P. Spooner, and John Stemplewicz
United States Department of Justice
Civil Division
P.O. Box 975

' The Court Monitor did not find that the Executive Director or any of the OHTA staff have intentionally sought to avoid this Court's ruling on conducting an historical accounting. Nor have their actions in attempting to comply with that ruling been contemptuous of this Court to this point. It is not the responsibility of laymen to answer the outstanding legal questions that their attorneys may believe have legal merit that, if answered in the affirmative, will enable OHTA to limit the historical accounting. They apparently are attempting to address these issues by establishing a process to resolve them. They have openly discussed this process with the Court Monitor. They also support resolution of the issues, if any, by this Court.

Ben Franklin Station
Washington, D.C. 20044-0875

Dennis Gingold, Esquire
Keith Harper, Esquire
Elliot Levitas
Thaddeus Holt
%Native American Rights Fund
1712 N Street, N. W.
Washington, DC 20036

Hon. Alan Balaran
Special Master
1777 Pennsylvania Avenue, N.W.
Suite 1200
Washington, DC 20006

Respectfully submitted,

JOSEPH S. KIEFFER, III
Court Monitor
D.C. Bar No.235200
(202) 208-4078

Date: _____